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JOHN ZANE,)
)
)
Appellant-Petitioner,)
)
)
vs.) No. 64A03-0709-CV-447
)
)
CITY OF PORTAGE AND CLIFFORD BIRCH,)
)
)
CHIEF OF POLICE OF THE CITY OF)
PORTAGE AND PORTAGE POLICE OFFICERS,)
)
DENNIS D. BAILEY, J. MOKOL AND)
)
ROSS HAYNES,)
)
)
Appellees-Petitioners.)

May 5, 2008

VAIDIK, Judge

Case Summary

John Zane appeals the trial court's grant of summary judgment in favor of the City of Portage, the Chief of Police of Portage, and three Portage police officers ("Portage" and the "Portage Police," respectively). Zane argues that the trial court incorrectly determined that there are no genuine issues of material fact in regard to his claims that Portage and the Portage Police violated his rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and are liable under Indiana tort law for damage to his property that occurred when the Portage Police entered Zane's house to retrieve a suicidal individual. Finding that Portage and the Portage Police are immune from liability under Zane's state law tort claims pursuant to the Indiana Tort Claims Act and that the police properly acted in response to exigent circumstances and without excessive force or deliberate indifference, we affirm.

Facts and Procedural History

On January 26, 2002, W.G. was staying at the Portage, Indiana, residence of his friend, Zane. W.G. had been drinking alcohol since the previous day. Zane was out of town. Lori Elkins, a friend of W.G., placed a 911 call and informed the dispatcher that W.G. was armed and threatening to commit suicide. Elkins provided Zane's address as W.G.'s location.

The Portage Police arrived at Zane's home. Janet Stepaniak, Zane's then-girlfriend, informed the officers that the residence contained weapons and a bunker, which Zane and W.G. had previously used as a hiding place when police came to the home. Stepaniak further told the officers that Zane and W.G. had expressed that they

could remain inside the bunker for several days during a stand-off with police. The Portage Police spoke with Zane via telephone in an effort to gain his assistance in resolving the situation peacefully. Zane refused to help. However, he informed the Portage Police that his dog, a beloved pet, was inside of the home.

For several hours, the Portage Police and hostage negotiators unsuccessfully attempted to convince W.G. to voluntarily exit the home. For safety reasons, they notified neighbors of the situation and established a perimeter around the residence. After fruitlessly attempting to coax W.G. out of the house and failing to make further contact with him, an officer trained in the use of tear gas and its launching apparatus shot tear gas into the residence in an effort to force W.G. out of the home. W.G. still did not come out of the residence. Thereafter, the Portage Police entered the home to find him. To gain entry, they had to break in the front door with a ram. As they entered, but were still outside of the house, Zane's sixty-six pound American Staffordshire Terrier¹ moved toward the officers. In response, an officer shot the dog. One round traveled through the animal, ricocheted off of some concrete, and struck an officer in the hand. Another round accidentally discharged into the home's ceiling.

Inside the home, the officers located an unharmed, but unconscious, W.G. They then transported him to a hospital. During the search of the residence, officers found and removed a .22-caliber rifle, a 12-gauge shotgun, an SKS-45 semi-automatic rifle with a loaded magazine, and an ammunition bag.

¹ This breed is related to the American Pit Bull Terrier.

Thereafter, Zane filed suit against Portage, Clifford Burch, the Chief of Police of the City of Portage, and Portage Police Officers Dennis Bailey, J. Mokol, and Ross Haynes, alleging liability for damage to his home and the death of his dog. In his complaint, he alleged that the Portage Police (and thereby Portage) tortiously damaged his property in the amount of \$30,000 (Count I) and that Portage and the Portage Police were liable to him under 42 U.S.C. § 1983 because they violated his Fourth, Fifth, and Fourteenth Amendment rights and “failed to enact and comply with rules and guidelines sufficient to deal with the circumstances which occurred at [Zane’s] home” (Count II). Appellant’s App. p. 45. The defendants responded and then filed a motion for summary judgment. After subsequent filings by both parties and a hearing on the summary judgment motion, the trial court issued an order granting summary judgment to Portage and the Portage Police. Zane now appeals.

Discussion and Decision

Zane appeals the grant of summary judgment in favor of Portage and the Portage Police. Specifically, he contends that there are genuine issues of material fact on the following issues: (1) whether Portage and the Portage Police are immune from liability under his tort claims pursuant to the Indiana Tort Claims Act and Indiana common law and (2) whether Zane is entitled to relief under 42 U.S.C. § 1983 because Portage and the Portage Police deprived him of his federal Fourth, Fifth, and Fourteenth Amendment rights and failed to adequately train and implement a policy for dealing with suicidal individuals. When reviewing a trial court’s grant of summary judgment, we apply the same standard used by the trial court. *Carlson v. Warren*, 878 N.E.2d 844, 850 (Ind. Ct.

App. 2007) (citing *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1282 (Ind. 2006)). Summary judgment “shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Ind. Trial Rule 56(C). On appellate review, “all facts and inferences drawn from them are construed in favor of the non-moving party.” *Carlson*, 878 N.E.2d at 850-51 (citing *Auto-Owners Ins. Co.*, 842 N.E.2d at 1282).

I. Immunity

A. Indiana Tort Claims Act

Zane alleged a number of state law tort claims against Portage and the Portage Police in his initial complaint. In response, the defendants contended that the Indiana Tort Claims Act (“ITCA”) shields them from liability under these claims, and the trial court granted summary judgment to Portage and the Portage Police on this issue. Zane now challenges this ruling.

The ITCA, found at Indiana Code chapter 34-13-3, provides immunity for governmental entities and employees against tort suits under certain circumstances. In particular, the statute provides:

A governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from the following: . . . The adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment.

Ind. Code § 34-13-3-3(8). “Because the ITCA is in derogation of the common law, we construe it narrowly against the grant of immunity. The party seeking immunity bears

the burden of establishing that its conduct comes within the ITCA.” *Savieo v. City of New Haven*, 824 N.E.2d 1272, 1275 (Ind. Ct. App. 2005) (citing *Mangold ex rel. Mangold v. Ind. Dep’t of Natural Res.*, 756 N.E.2d 970, 975 (Ind. 2001)), *trans. denied*. Whether a governmental body or employee is immune from liability under the ITCA is a question of law, which we review *de novo*. *City of Anderson v. Davis*, 743 N.E.2d 359, 362 (Ind. Ct. App. 2001), *trans. denied*. In determining whether Indiana Code § 34-13-3-3(8) provides immunity for a police officer, we first determine whether the officer was acting within the scope of his or her employment when the injury to a plaintiff occurred and, second, whether the officer was engaged in the enforcement of a law at that time. *Davis*, 743 N.E. 2d at 364; I.C. § 34-13-3-3(8).

1. Scope of Employment

Our Supreme Court has explained, “An employee’s scope of employment consists of activities involving the pursuit of the governmental entity’s purpose.” *King v. Ne. Sec., Inc.*, 790 N.E.2d 474, 483 (Ind. 2003), *reh’g denied*. This includes “conduct . . . of the same general nature as that authorized, or incidental to the conduct authorized.” *Celebration Fireworks, Inc. v. Smith*, 727 N.E.2d 450, 453 (Ind. 2000) (quoting Restatement (Second) Agency § 229 (1958)). As Portage and the Portage Police point out in their appellate brief, under Indiana law, police departments are required, among other things, to do the following: preserve the peace, prevent offenses, guard public health, and enforce laws. Ind. Code § 36-8-3-10(a)(1), (2), (7), (14).

Zane appears to argue that the officers were not acting within the scope of their employment because they were not engaged in the process of arresting anyone when his

property was damaged. However, “police are expected not only to enforce the criminal laws but also to aid those in distress, abate hazards from materializing, and perform an infinite variety of other tasks calculated to enhance and maintain the safety of communities.” *Fair v. State*, 627 N.E.2d 427, 431 (Ind. 1993). Police officers’ statutory responsibilities extend well beyond making arrests. Particularly relevant to our evaluation here is Indiana Code § 12-26-4-1, which authorizes police officers to apprehend and transport mentally ill individuals who are in need of immediate assistance. This statute provides in pertinent part:

A law enforcement officer, having reasonable grounds to believe that an individual has a mental illness, is dangerous, and is in immediate need of hospitalization and treatment, may do the following:

(1) Apprehend and transport the individual to the nearest appropriate facility. The individual may not be transported to a state institution.

Ind. Code § 12-26-4-1. The Portage Police’s decision to apprehend W.G., an apparently armed suicidal individual, from Zane’s house and transport him to a hospital was authorized by Indiana Code § 12-26-4-1 and unquestionably protected the peace and public health. *See* I.C. § 36-8-3-10(a)(1), (7). Thus, it is apparent that this course of action fell within the officers’ scope of employment.

2. Enforcement of a Law

The next question is whether the Portage Police, acting within the course of their employment, were engaged in the enforcement of a law when Zane’s property was damaged. *Davis*, 743 N.E. 2d at 364; I.C. § 34-13-3-3(8). Zane’s contention in this regard is that suicide is not illegal in Indiana and the officers were not attempting to arrest anyone during the incident in question.

We have squarely addressed this question in the past. In *Savieo v. City of New Haven*, we determined that a police officer's decision to act or not act pursuant to Indiana Code § 12-26-4-1 constitutes "enforcement" for the purposes of immunity under the ITCA. *Savieo*, 824 N.E.2d at 1276. We held:

Granted, Indiana Code Section 12-26-4-1 does not criminalize conduct and thus cannot be "enforced" in the same sense as a statute outlawing murder, for example, but it does grant a law enforcement officer the discretion to compel another's obedience to the police powers of the state as defined by its laws and constitution, regardless of whether the person is suspected of committing a crime. The exercise of this discretion is the very essence of law enforcement; accordingly, *we hold that police officers and their governmental employers are entitled to immunity if a loss results from the decision to apprehend (or not to apprehend) a mentally ill and dangerous person "in immediate need of hospitalization and treatment" pursuant to Indiana Code Section 12-26-4-1.*

Id. (Emphasis added). Thus, in the present case, the Portage Police were not only acting within the "scope of . . . [their] employment" but were also "enforc[ing] . . . a law" when they entered Zane's property, killing his dog and causing some damage to the home, in order to apprehend W.G. I.C. § 34-13-3-3(8).

3. Excessive Force

Zane contends that the Portage Police used "excessive force" when retrieving W.G. from his home in order to transport him to the hospital. Appellant's Br. p. 20. In the context of reviewing the ITCA, we construe this claim to be that the officers' actions were in some manner illegal and therefore do not fall within the purview of either the scope of their employment or the legitimate enforcement of a law.² See *O'Bannon v.*

² We recognize that in *Kemezy v. Peters*, 622 N.E.2d 1296, 1297 (Ind. 1993), our Supreme Court wrote that, in the context of police officers making arrests, the use of excessive force is not immunized under the ITCA. *Kemezy* relied upon the public/private duty test articulated in *Quakenbush v. Lackey*, 622 N.E.2d 1284 (Ind. 1993), for this proposition. However, our Supreme Court has since disavowed this

City of Anderson, 733 N.E.2d 1, 3 (Ind. Ct. App. 2000). However, we have already determined that the officers' decision to apprehend W.G. was not only expressly authorized by Indiana Code § 12-26-4-1 but also constituted law enforcement and promotion of public safety and peace, all of which are responsibilities entrusted to police officers in this state. I.C. § 36-8-3-10(a)(1), (7), (14).

Additionally, the facts do not support the conclusion that the Portage Police used excessive force when retrieving W.G. from Zane's home. "Excessive force claims are governed by a Fourth Amendment objective reasonableness standard . . . [and] must be evaluated from the perspective of the 'reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *O'Bannon*, 733 N.E.2d at 3 (citing *Graham v. Connor*, 490 U.S. 386, 388, 396-97 (1989)). Whether the amount of force used by police is excessive under the circumstances is a question for the trier of fact, *City of Indianapolis v. Ervin*, 405 N.E.2d 55, 60 (Ind. Ct. App. 1980), and we review factual findings only for clear error, *Horseman v. Keller*, 841 N.E.2d 164, 169 (Ind. 2006). "Findings of fact are clearly erroneous when the record lacks any reasonable inference to support them." *Id.* (citation omitted). Here, the trial court found that "the evidence presented does not suggest that the force used was outrageous or that the damage to Zane's residence was excessive," Appellant's App. p. 22, and used this finding to reach the conclusion that the ITCA provides immunity for the defendants. We agree with this finding.

test for claims of immunity for law enforcement activities under both the ITCA and Indiana common law. *King*, 790 N.E.2d at 482 (explaining that *Benton v. State*, 721 N.E.2d 224 (Ind. 1999), expressly overruled the public/private duty test at common law and "implicitly achieved this result" for claims made under the ITCA).

The officers responding to Elkins' call were aware that an intoxicated and armed man was inside of Zane's residence and had threatened suicide. *Id.* at 66. Once on the scene, the officers encountered Zane's then-girlfriend, who informed them that the house contained a bunker and various weapons and that W.G. and Zane had discussed using the bunker during a stand-off with police. *Id.* at 68. For several hours, the Portage Police attempted to resolve the situation without the use of force. *Id.* at 74. However, W.G. did not emerge from the residence. The Portage Police eventually attempted to compel W.G. to leave the house by shooting tear gas in through windows. It was only when this effort failed that officers forcibly opened the door. As they entered, Zane's sixty-six pound dog, *id.* at 64, which resembled a pit bull, *id.* at 63, approached the officers in a "threatening manner," *id.* at 77. Perceiving a "threat," an officer shot the dog. *Id.* The officers then entered the home, located an unconscious W.G., and took him to a hospital. During this process, an officer's weapon accidentally fired once, striking a ceiling. *Id.* at 78. From these facts, we cannot say that the trial court erred in finding that the amount of force employed was reasonable under the circumstances. Thus, Zane's argument that the amount of force used by the Portage Police removes their conduct from the protections of the ITCA is unavailing. Pursuant to the ITCA, Portage and the Portage Police are immune from liability resulting from losses sustained by Zane during the incident.³ *Id.* Summary judgment was appropriate on this issue because there are no genuine issues of material fact regarding whether the ITCA grants immunity to the defendants.

³ Portage and the Portage Police alternatively argue that Zane's tort claims against individual government employees fail because the officers' conduct was not willful or wanton. We need not address this contention because it would be relevant only if we concluded that the officers acted outside the scope of their employment. See *Cantrell v. Morris*, 849 N.E.2d 488, 497 n.6 (Ind. 2006); Ind. Code § 34-13-3-5(c).

B. Indiana Common Law Immunity

Zane also seems to contend that the trial court erred in granting summary judgment on the question of whether Portage and the Portage Police are immune from suit under Indiana common law. We note that the trial court did not base any part of its summary judgment ruling upon Indiana common law immunity, as it had already determined that the defendants are immune from liability under Indiana statutory law. Indeed, Indiana common law provides, in certain situations, immunity for governmental actors who are not shielded from liability under the ITCA. *See Savieo*, 824 N.E.2d at 1276. However, because the ITCA shields Portage and the Portage Police from liability under Zane's state law tort claims, we need not address the question of whether Indiana common law provides him immunity.

II. Relief Under 42 U.S.C. § 1983

Zane next contends that the trial court erred in granting summary judgment in favor of Portage and the Portage Police on his claims that they violated his Fourth, Fifth, and Fourteenth Amendment rights and failed to adequately train and implement a policy for dealing with suicidal individuals. 42 U.S.C. § 1983 (1996) provides, in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Rather than creating substantive rights, this statute provides civil remedies for deprivations of federal rights established elsewhere. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

A claim for relief under 42 U.S.C. § 1983 “need allege only that some person acting under color of state law has deprived the claimant of a federal right.” *Matter of Tina T.*, 579 N.E.2d 48, 62 (Ind. 1991). To recover damages under 42 U.S.C. § 1983, a plaintiff must show that “1) he held a constitutionally protected right; 2) he was deprived of this right; 3) the defendants acted with reckless indifference to cause this deprivation; and 4) the defendants acted under the color of state law.” *Long v. Durnil*, 697 N.E.2d 100, 105 (Ind. Ct. App. 1998) (citing *Culver-Union Twp. Ambulance Serv. v. Steindler*, 629 N.E.2d 1231, 1232-33 (Ind. 1994)), *trans. denied*. For the purposes of this appeal, Portage and the Portage Police do not dispute that Zane can properly sue them as “person[s]” under 42 U.S.C. § 1983, Appellee’s Br. p. 18; *see also Ross v. Ind. State Bd. of Nursing*, 790 N.E.2d 110, 117 (Ind. Ct. App. 2003), or that the Portage Police were acting under color of law. Further, there is no question that the Fourth, Fifth, and Fourteenth Amendments make certain guarantees to Zane. Thus, the questions relevant to our review of each of Zane’s constitutional claims are, first, whether he was deprived of a right and, second, whether Portage and the Portage Police acted with reckless indifference to effect the deprivation. *Long*, 697 N.E.2d at 105.

A. Fourth Amendment

Zane contends that the Portage Police violated the Fourth Amendment when they entered his home without a warrant. Specifically, Zane contends that the trial court erred

in finding that exigent circumstances existed to justify the warrantless entry and that the force used was not excessive.

The Fourth Amendment to the United States Constitution provides, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause” U.S. Const. amend. IV. “[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Brown v. State*, 653 N.E.2d 77, 80 (Ind. 1995) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). “Once it has been shown that a search was conducted without a warrant, the burden shifts to the state to demonstrate that the search or seizure falls within” an exception to the warrant requirement. *Id.* at 81. “In evaluating the propriety of a warrantless search on appeal, the trial court’s findings of fact are accepted unless clearly erroneous and the review of the conclusions of law is performed *de novo*.” *Id.*

An exception to the general warrant requirement is where exigent circumstances “make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.” *Holder v. State*, 847 N.E.2d 930, 936-37 (Ind. 2006) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978)). “Among the exigencies that may properly excuse the warrant requirement are threats to the lives and safety of officers *and others*” *Id.* (citing *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (emphasis added)). “Police officers can properly enter a house without a search

warrant where they reasonably believe that a person there is in need of immediate aid.” *Roberts v. State*, 599 N.E.2d 595, 599 (Ind. 1992), *reh’g denied*. However, police officers must have probable cause to enter the premises. *Frensemeier v. State*, 849 N.E.2d 157, 161 (Ind. Ct. App. 2006) (citing *Conwell v. State*, 714 N.E.2d 764, 766 (Ind. Ct. App. 1999)), *trans. denied*.

Here, it is undisputed that the officers lacked a warrant to enter Zane’s residence to apprehend W.G. In his appellate brief, Zane contends that the exigent circumstances exception to the warrant requirement is inapplicable to his case because W.G. “presented no danger to any one [sic].” Appellant’s Br. p. 22. To the contrary, as the trial court noted in its summary judgment order, W.G. “himself was in imminent danger” because he had threatened suicide. Appellant’s App. p. 23. Additionally, the officers knew that the residence contained multiple weapons and that W.G. was intoxicated. We agree with the trial court that “[t]he circumstances surrounding the police officers’ entry into Zane’s residence reasonably suggest that [W.G.] was in need of medical attention.” *Id.* at 27.

Additionally, to the extent that Zane contends that the Portage Police lacked probable cause to enter the premises, we disagree. The Portage Police received the information through a dispatcher that Elkins, a friend of Zane and W.G., had called police to alert them to W.G.’s suicide threat. Once on the scene, officers confirmed that W.G. was inside of the residence and Zane’s then-girlfriend informed officers that the home contained weapons and a bunker. The police had ample cause to believe that W.G. presented imminent danger to himself and was in need of aid. *See Row v. Holt*, 864 N.E.2d 1011, 1019 (Ind. 2007) (citing *Moody v. State*, 448 N.E.2d 660, 663 (Ind. 1983)

(recognizing that probable cause may be established by a police dispatch call)). Thus, the Portage Police did not violate the Fourth Amendment by entering Zane's home without a warrant because exigent circumstances and probable cause existed to justify the entry.

Zane also contends that the Portage Police conducted an unreasonable search and seizure because they used excessive force. However, we have already determined that the amount of force employed by the Portage Police when entering Zane's home to apprehend W.G. was objectively reasonable in light of the circumstances of the case. The police did not use excessive force, and thus Zane's Fourth Amendment claim to this effect fails. The trial court properly granted summary judgment in favor of the defendants on Zane's Fourth Amendment claim.

B. Fifth Amendment

Zane next contends that the Portage Police violated his right under the Fifth Amendment to the United States Constitution to be free from governmental takings of his property without compensation. The Fifth Amendment provides in part, "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Zane's Fifth Amendment argument consists of only one paragraph in his twenty-six page brief. Appellant's Br. p. 24. His argument provides a brief summary of the protection afforded by the Fifth Amendment but does not even attempt to tell us how he believes the Portage Police violated his Fifth Amendment rights. Thus, he has waived this issue for failure to make a cogent argument. Ind. Appellate Rule 46(A)(8)(a); *McMahon v. State*, 856 N.E.2d 743, 751 (Ind. Ct. App. 2006).

C. Fourteenth Amendment

Zane next argues that the Portage Police violated his Fourteenth Amendment guarantees to substantive and procedural due process. Specifically, he contends that the Portage Police officers' actions violated a constitutional right and shocked the conscience and that the officers' warrantless entry into his home deprived him of due process of law.

The Fourteenth Amendment to the United States Constitution provides that the state may not deprive a person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV § 1. A plaintiff may bring suit under 42 U.S.C. § 1983 for alleged governmental violations of substantive and procedural due process as guaranteed by the Fourteenth Amendment. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990). “[T]he touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.” *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (citations omitted). “A due process claim requires the consideration of two factors: first, there must be a deprivation of a constitutionally protected property or liberty interest; and, second, a determination of what procedural safeguards are then required.” *Ross*, 790 N.E.2d at 120 (citing *City of Indianapolis v. Tabak*, 441 N.E.2d 494, 496 (Ind. Ct. App. 1982)).

1. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment encompasses “a substantive component that bars certain arbitrary, wrongful government actions

‘regardless of the fairness of the procedures used to implement them.’” *Zinermon*, 494 U.S. at 125 (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). A substantive due process “violation actionable under [42 U.S.C.] § 1983 is complete when the wrongful action is taken.” *Id.* (citing *Daniels*, 474 U.S. at 338 (Stevens, J., concurring in judgments)).

Zane’s substantive due process argument is that the Portage Police deprived him of due process of law by violating his Fourth Amendment right to be free from unreasonable search and seizure. Appellant’s Br. p. 22-23. However, as we have already concluded, there was no violation of Zane’s Fourth Amendment guarantees. As such, the Portage Police did not violate Zane’s substantive due process rights by the manner in which they entered his home without a warrant to apprehend W.G.

The Portage Police acknowledge correctly in their appellate brief that “[t]o the extent that any of Zane’s allegations fall outside these constitutional sources,^[4] in order for Zane to make a cognizable Substantive Due Process claim, he must show that the level of executive abuse of power is that which ‘shocks the conscience’ or which exhibits a deliberate indifference to a person’s life, liberty, or property.” Appellee’s Br. p. 28 (citing *County of Sacramento*, 523 U.S. at 846-47, 849). We agree with the trial court, however, that the Portage Police officers’ conduct did not rise to this level. *See* Appellant’s App. p. 31. We observe that only Zane’s property—his house and his dog—was impacted by the officers’ conduct, not Zane’s life or liberty. The question becomes,

⁴ The defendants respond to Zane’s Due Process Clause contentions with reference to both the Fourth and Fifth Amendments. We appreciate the thoroughness of their briefing. We have concluded, however, that Zane has waived his Fifth Amendment argument, and Zane additionally presents no argument linking a Fifth Amendment claim to his Fourteenth Amendment claim.

then, whether the Portage Police acted with deliberate indifference to his property. Although Zane's home indisputably suffered damage when an officer shot tear gas in through windows, when officers used a ram to open the door, and when two shots were fired, and Zane's dog was shot and killed during the process of entering the residence, we have already concluded that the Portage Police did not use excessive force when entering Zane's home. The officers were responding to an emergency situation in which an intoxicated and armed man had threatened to commit suicide and resisted efforts to be assisted to safety by the police. In order to reach W.G., who would not voluntarily come out of Zane's home, officers were compelled to make forced entry because Zane refused to cooperate to help them enter the premises. Unfortunately, during the officers' entry into the home, they felt threatened by the manner in which Zane's large dog approached them. All evidence points to an officer shooting the dog in response to a perceived threat to the officers' safety. This was not deliberate indifference to Zane's property. *See County of Sacramento*, 523 U.S. at 853 (“[W]hen unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates ‘the large concerns of the governors and the governed.’”) (quoting *Daniels*, 474 U.S. at 332). The trial court did not err in finding that summary judgment was appropriate on this point.

2. Procedural Due Process

The Due Process Clause also encompasses a guarantee of fair procedure. *Zinermon*, 494 U.S. at 125. “In procedural due process claims, the deprivation by state action of a constitutionally protected interest in ‘life, liberty, or property’ is not in itself

unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*” *Id.* To determine what process is required to protect a constitutionally protected interest, we weigh three factors established by the United States Supreme Court:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

City of Indianapolis, 441 N.E.2d at 497 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). We keep in mind that “[d]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

In this appeal, the private interest to which Zane refers in his due process argument is his Fourth Amendment right to be free from unreasonable searches and seizures. We weigh against this the risk of an erroneous deprivation of this right through the methods used by the Portage Police and the government’s interest in engaging in this particular course of action versus an alternative procedure. Here, Zane contends that the Portage Police wrongfully entered his home without a warrant and caused excessive damage. Typically, the “Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property.” *Zinermon*, 494 U.S. at 127. However, exigent circumstances permitted the Portage Police to enter Zane’s residence without a warrant as required by the Fourth Amendment. Further, Zane has a post-deprivation remedy available to him through the court system, and the Supreme Court has recognized that

such a remedy can satisfy procedural due process. *Id.* at 128 (“[T]he necessity of quick action by the State or the impracticality of providing any predeprivation process’ may mean that a postdeprivation remedy is constitutionally adequate”) (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982)). Indeed, the Supreme Court has found that a state’s extension of immunity to particular actors does not invalidate the post-deprivation proceeding’s sufficiency under procedural due process standards. *Logan*, 455 U.S. at 432 (“We acknowledged that the grant of immunity arguably did deprive the plaintiffs of a protected property interest. But they were not thereby deprived of property without due process”). This post-deprivation remedy available to Zane, considered alongside the officers’ strong interest in acting quickly to save W.G.’s life and the impracticality of waiting for a pre-deprivation hearing, supports the trial court’s conclusion that Zane was not denied procedural due process. The trial court did not err in granting summary judgment with respect to this issue.

D. Inadequate Training or Policy

Finally, Zane contends that liability under 42 U.S.C. § 1983 extends to Portage because the city failed to adequately train officers and implement a policy for dealing with suicidal individuals. Under 42 U.S.C. § 1983, “a municipality may be held liable for the unconstitutional actions of its officers committed pursuant to an official policy or custom.” *Wallace v. Estate of Davies*, 676 N.E.2d 422, 428 (Ind. Ct. App. 1997) (citing *Monell v. New York City Dep’t of Social Servs.*, 436 U.S. 658, 694 (1978)), *trans. denied*; *see also City of Hammond*, 788 N.E.2d at 1281. When a plaintiff alleges that a municipality failed to adequately train its employees, we review the municipality’s

actions for deliberate indifference to the constitutional rights of its citizenry against the following three requirements:

First, the plaintiff must show that a policymaker knows that the employees will confront a given situation. Second, the plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training will make less difficult or that there is a history of employees mishandling the situation. Finally, the plaintiff must show that the wrong choice by the employee will frequently cause the deprivation of a citizen's constitutional rights.

Wallace, 676 N.E.2d at 428-29 (citing *Walker v. City of New York*, 974 F.2d 293, 297-98 (2d Cir. 1992)).

Once again, we have concluded that the trial court correctly found that the Portage Police did not violate Zane's constitutional rights. For this reason, no liability attaches to Portage under 42 U.S.C. § 1983. Additionally, Zane has failed to show that the Portage Police received inadequate training or that the city lacked a policy for handling situations such as the one officers faced here. Zane concedes that the Portage Police were trained in how to use tear gas but contends that there is "no evidence of [a] policy on when to use gas." Appellant's Br. p. 25. However, in his complaint and in his response to the defendants' motion for summary judgment, Zane did not present any argument or evidence pertaining to the requisite factors, *Wallace*, 676 N.E.2d at 428-29, and the evidence simply does not reflect deliberate indifference on the part of Portage or the Portage Police. In response to a suicide threat by an armed W.G., Portage Police surrounded his location, alerted the neighbors, utilized hostage negotiators to communicate with him, attempted to secure the assistance of Zane, and finally resorted to tear gas to compel W.G. out of the home. An officer trained in the use of tear gas fired it

in through the home's windows, and it was only after W.G. still did not emerge that officers forced their way into the house to retrieve him. The trial court did not err in granting summary judgment in favor of Portage on this point.

Conclusion

The trial court correctly determined that Portage and the Portage Police are immune from liability under Zane's state law tort claims pursuant to the Indiana Tort Claims Act. Further, the Portage Police did not violate Zane's Fourth and Fourteenth Amendment rights and are therefore not liable to Zane under 42 U.S.C. § 1983. Finally, Zane has not shown that Portage has an inadequate policy or training program for officers faced with similar situations, and Portage is therefore not liable to Zane pursuant to 42 U.S.C. § 1983. The trial court's grant of summary judgment in favor of the defendants is affirmed.

SHARPNACK, Sr. J., and BARNES, J., concur.